LOYLA C. WASKUL

IBLA 86-290 Decided May 19, 1988

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting color-of-title application ES-31715.

Affirmed.

1. Color or Claim of Title: Generally -- Color or Claim of Title: Applications -- Color or Claim of Title: Description of Land -- Surveys of the Public Lands: Omitted Lands

A class 1 color-of-title claim requires good faith and peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years. The claim or color of title must be based upon a document which, on its face, purports to convey the claimed land to the applicant or the applicant's predecessors.

APPEARANCES: Sam A. Aluni, Esq., Virginia, Minnesota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Loyla C. Waskul has appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated December 17, 1985, rejecting her class I color-of-title application ES-31715, submitted pursuant to the Color of Title Act, 43 U.S.C. § 1068 (1982). The tract of land sought was described in the application as lot 9 and Tract 40 of sec. 21, T. 64 N., R. 18 W., fourth principal meridian, Minnesota, and is located in Elbow Lake, Minnesota. In order to understand the issues involved, it is first necessary to briefly review certain facts which are not in dispute.

Township 64 N., R. 18 W., Fourth Principal Meridian, was initially surveyed in the 1890's and the first survey plat was approved on August 22, 1895. This survey plat showed an island, identified as lot 9, in the SW 1/4 sec. 21 of the township. The survey returned the island as containing 4.25 acres. In June 8, 1901, patent for lot 9 issued to one Franklin R. Webber, assignee of John Dressler, pursuant to Soldier's Additional Homestead application 13262.

Various conveyances of lot 9 occurred in the ensuing years. Of particular relevance herein is the 1957 conveyance from Florence Johnson to Charles

and Ruby Pohl. Prior to that time, all conveyances of the land had been limited to a description thereof as "Lot 9, Section 21, Township 64, Range 18," occasionally in conjunction with the conveyance of "other land." The 1957 conveyance deeded to the Pohls "all that part of Government Lot 9, Section 21, Township 64, Range 18, which lies east of a line drawn parallel to and distant 1125.0' from the west section line of said Section 21, Township 64, Range 18." The land involved in the grant to Charles and Ruby Pohl is not involved in this appeal. Rather, this case involves the question of what land, if any, was excepted from that conveyance.

The probate decree of distribution of Florence Johnson's estate was filed on December 23, 1959, and vested in Johnson's daughter, Margaret Hassel (who is appellant's mother), title to "Lot 9, Section 21, Township 64, Range 18, excepting that part which lies East of a line drawn parallel to and distant 1125 feet from the West Section Line, said Section 21." All subsequent conveyances in appellant's chain of title replicate this description.

In 1975, BLM authorized the survey of a number of islands which had not heretofore been surveyed. Included in this survey was a small island (0.74 acre) located immediately southwest of lot 9. As it turned out, this island, denominated in the survey as Tract 40, contained a number of improvements made by appellant and her predecessors-in-interest. 1/ This survey was officially accepted on February 9, 1981, and was filed on August 24, 1981. Shortly thereafter, appellant commenced her efforts to acquire the land under the provisions of the Color of Title Act.

An initial land report, dated September 30, 1982, found that the claim had been held in good faith, peaceful adverse possession for 20 years and that valuable improvements had been placed on the land. It was therefore recommended that appellant's color-of-title application be granted. This recommendation was ultimately not accepted, however, because the applicant could not show a document which, on its face, purported to convey the island now denominated as Tract 40. On that basis, BLM rejected the application. From this rejection, Waskul has pursued the instant appeal.

The Color of Title Act, 43 U.S.C. § 1068 (1982), provides, in pertinent part, that:

1/ The following improvements were discovered on Tract 40 during a field examination on Nov. 11, 1980:

1) Cabin, L-shaped - 25' x 25', asphalt siding (imitation brick), fair condition.
2) Storage shed, 9' x 15', wood frame, white with red trim, fair condition.
3) Privy, 4' x 4', fair condition.
4) Dock, 12' long, good condition.
5) The remains of two old log cabins.

These improvements had been noted in an earlier field inventory conducted on Mar. 14, 1969.

> The Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation * * * issue a patent for not to exceed one hundred and sixty acres of such land upon the payment of not less than $ 1.25 per acre.

We note at the outset that the only issue in dispute is whether or not the probate decree of distribution of the estate of Florence Johnson is a sufficient basis on which to support a claim or color of title to the land denominated as Tract 40. We think not.

It is beyond dispute that the mere use or occupancy of Federal land without color of right gives no prescriptive rights against the United States. See, e.g., United States v. Osterland, 505 F. Supp. 165 (D. Colo. 1981). Absent an individual's ability to show that he or she has complied with the statutory requirements of the Color of Title Act, unauthorized use and occupancy of land owned by the United States, even if in absolute good faith, affords no rights to that land.

Among the statutory preconditions for allowance of a color-of-title application is the requirement that the possession of the land be under claim or color of title. In this regard, the Board has noted that a claim or color of title "must be established, if at all, by a deed or other writing which purports to pass title and which appears to be title to the land, but which is not good title." Marcus Rudnick, 8 IBLA 65, 66 (1972). See also Agee L. Broughton, Jr., Trustee, 95 IBLA 343, 344 (1987). Moreover, this deed or other writing must "on its face" purport to convey title to the land described in the application. See Wilbur C. Nemitz, 97 IBLA 121, 124 (1987); James E. Gaylord, Jr., 94 IBLA 392, 397-98 (1986). As the Board has noted, "the instrument of conveyance upon which an applicant relies is sufficient to provide color of title only if it describes the land conveyed with such certainty that the boundaries and identity of the land may be ascertained." Charles M. Schwab, 55 IBLA 8, 11 (1981).

The conveyance upon which appellant bases her color-of-title claim is the probate distribution decree which conveyed title to "Lot 9, Section 21, Township 64, Range 18, excepting that part which lies East of a line drawn parallel to and distant 1125 feet from the West Section Line, said section 21." On its face, it is clear that this conveyance conveys only land in lot 9. To the extent, therefore, that Tract 40 can be said to be separate and distinct from lot 9, this description cannot be said to embrace Tract 40.

Appellant argues that "Lot 9 which is owned by Loyla Waskul has historically and of record included a tract which is now designated as tract 40 and both of said properties were intended and have always been considered by all owners within the chain of title to be part of Lot 9." This argument,

however, goes not to the question of whether or not the probate decree, on its face, purported to convey Tract 40, so much as it challenges the resurvey which was filed on August 24, 1981. In other words, appellant is basically contending that the island which BLM surveyed as Tract 40 is actually part of lot 9. This is, therefore, a challenge to the Government's ownership of the land denominated as Tract 40. Such a challenge, however, cannot properly be made in the context of a color-of-title application.

We have noted on numerous occasions that a color-of-title applicant may not contest Government ownership of the land sought. See Jerome L. Kolstad, 93 IBLA 119, 122 (1986); Benton C. Cavin, 83 IBLA 107, 109 n.2 (1984). As we stated in Kolstad,

> Insofar as a color-of-title application is concerned, an applicant necessarily admits the title to the land is in the United States since, by filing the application, an applicant seeks to have the United States convey actual title to him. Thus, an applicant cannot be heard to assert that his color of title is based on a patent from the Government because, if this were true, the applicant would possess actual title not color of title.

Id. If appellant wishes to assert that she has actual title to the land in issue, she must do so in an action directly challenging the survey. The survey, however, is not subject to collateral attack in the present proceeding.

A document which, on its face, purports to convey title to only a portion of lot 9 could not be said to convey any portion of Tract 40, unless appellant could show that the description was ambiguous and that resort to extrinsic evidence would make the description definite and embrace the parcel of land now denominated as Tract 40. 2/ A number of Board decisions have explored the use of such evidence to make definite an ambiguous description. A review of these precedents, however, clearly shows that appellant has not even alleged facts which would justify resort to such evidence.

In Hugh Manning, A-28383 (Aug. 18, 1960), the applicant essentially argued that a chain of title which described land as lot 8 should be read to include lot 1, because a predecessor-in-interest had fenced lot 1 with lot 8 and cultivated part of the lot. Appellant also argued that there was an old county plat which showed lot 8 as occupying the entire area in question. Solicitor Abbott rejected this appeal, noting that "there is no showing by

2/ In this regard, we are at a loss to understand the dissent's implicit assertion that we are seeking to create an ambiguity where none exists. If there is no ambiguity in the instrument conveying title to appellant, appellant cannot possibly succeed in her color-of-title application since the description used in the various conveyances refers only to lot 9 and the parcel which she seeks is not part of lot 9. To deny the existence of an ambiguity in this case is to automatically foreclose allowance of appellant's application.

the appellant that such a county plat existed in 1908 when the State patented lot 8 to [his remote predecessor-in-interest] or that, even if such plat did exist, [his predecessor] relied upon it."

In Mabel M. Farlow, 30 IBLA 32, 84 I.D. 276 (1977), the appellant therein argued that numerous local maps showed lot 5 to be on both sides of the Deschutes River, despite the fact that the official plat of survey showed lot 5 only east of the river. Id. at 327-28, 84 I.D. at 279-80. Based on these allegations, the Board referred the matter for a hearing to decide, inter alia, "whether there is sufficient color of title to land west of the river from other records, plats, etc., as well as the deeds, as we have discussed above." Id. at 332, 84 I.D. at 282. This color-of-title application was ultimately rejected, however, because the applicant was unable to provide proof that remote conveyors had relied on local maps or plats. See Mable M. Farlow (On Reconsideration after Hearing), 39 IBLA 15, 86 I.D. 22 (1979).

In Mary C. Pemberton, 38 IBLA 118 (1978), the Board ordered a hearing to determine whether a conveyancing document which described the land conveyed as the "September Millsite," was intended to convey 4.90 acres of land so described in Mineral Survey No. 66B or the September Millsite as it was actually patented, which excluded 1.48 acres of land in the west portion of survey 66B. Appellant had alleged that various maps existed in the late 1800's which showed the September Millsite as a square consisting of 4.90 acres. A hearing was ordered so that "evidence can be adduced and arguments made as to the meaning of maps, plats, etc., for color of title purposes." Id. at 125. After the hearing, however, this application was also rejected since no reliance on such extrinsic evidence could be shown. See Mary C. Pemberton, 47 IBLA 373 (1980).

These decisions stand in stark contrast to the facts of the present appeal. While appellant asserts that she has always considered the lands now described as Tract 40 to be part of lot 9, there is no allegation whatsoever of extrinsic evidence such as local plats, maps, etc., that show such land as part of lot 9. The record in the present case does not justify the grant of a fact-finding hearing, since appellant has not alleged the existence of such extrinsic evidence. There being no maps, there could be no reliance. In the absence of even an allegation as to the existence of such evidence, no hearing is warranted. See Cumberland Reclamation Co., 102 IBLA 100 (1988).

A few references to the dissent are in order at this point. The dissent asserts that

> the various plats filed as a result of Government surveys all depict lot 9 in a slightly different manner. The plat which has the most bearing on the interpretation of the conveyances, and thus on [the] validity of appellant's color of title claim is the plat approved in 1931. This was the latest plat depicting sec. 21 at the time of the conveyances. The 1931 plat clearly depicts the westerly tip of lot 9 as being noticeably longer than

> it is shown on either the 1895 or 1981 plat. The course of this elongation is in line with the 1975 placement of Tract 40. Comparison of the 1931 plat and the plat approved in 1981 would clearly support a finding that Tract 40 is now positioned within the outline of lot 9 on the 1931 plat. [Footnote omitted.]

Infra at 251. In our view, the above quotation represents a serious misinterpretation of both the relevant law and the facts disclosed in the instant appeal.

In the first place, the 1931 plat was not an official plat of lot 9 at any point in time. The survey plat accepted on August 22, 1895, has been and continues to this day to remain the only survey of lot 9. Lot 9 has never been resurveyed since that date. Indeed, after the patent for lot 9 issued in 1901, the United States was without any authority to resurvey that island since, with certain exceptions not relevant herein, its authority to conduct cadastral surveys extends only to the public lands of the United States. See 43 U.S.C. §§ 2, 751-774 (1982).

The 1931 plat, like the 1981 plat, does not purport to be an official plat of every parcel drawn thereon. On the contrary, both plats expressly note, on their face, that they are only the official plats of specified islands. Thus, the 1931 plat is entitled "Plat of Two Islands in Elbow Lake, Secs. 21 and 29." The two islands surveyed in the 1931 plat are identified as lot 10 in sec. 21 and lot 14 in sec. 29, with a combined area surveyed as 0.63 acre. Nothing in the 1931 plat purports to establish the acreage or configuration of any other parcel of land in the four contiguous sections other than those two lots actually surveyed.

The surveys conducted subsequent to the initial survey in the 1890's are not general resurveys of the sections involved. Rather, they are what is known as "fragmentary surveys." Thus, the Manual of Surveying Instructions, 1973, notes that "[t]he term 'fragmentary survey' is applied to surveys made to identify parts of townships and sections that were not completed in the first instance. In this class are included partially surveyed sections; [and] omitted islands * * *" (Par. 9-78). The Manual further notes that "[i]n all such fragmentary surveys the new lottings are in addition to but without changing the former subdivisions if alienated" (Par. 9-80; emphasis supplied). Thus, nothing appearing on the subsequent fragmentary plats with respect to lot 9 was ever meant to be anything other than a generalized depiction of that island. The only survey plat that purported to establish the boundaries of lot 9 was the 1895 plat of survey.

In this regard, we think it useful to keep certain historical realities in mind. Throughout the mid-1800's, surveyors were instructed not to survey islands within navigable waterways unless those islands were deemed suitable for agricultural use. Even when instructions were issued to survey all islands, the practice was all too common of limiting surveys to only those islands which were crossed by a section line. See Joseph Tomalino, 42 IBLA 117, 121 (1979). As a result, many islands of relatively

small size were not originally surveyed. Subsequently, as the riparian lands were taken up, local landowners, interested in acquiring title to these islands, would make application to have them surveyed. See, e.g., Robert L. Sheppard, 32 L.D. 474 (1904). This was necessary since, until such lands were surveyed, they were not open to appropriation under the public land laws.

When such surveys were authorized they would be expressly limited to the specific islands identified by the applicants. In other words, the surveyors would not traverse a general area, surveying any island they happened upon. Rather, they were expressly limited by their instructions to survey only particular islands. Thus, the number of prior surveys which had been conducted "in the area" (which for the dissent's purposes includes three surveys which did not even involve land in sec. 21), is a matter of total irrelevancy insofar as any question of the correctness of the 1975 survey is concerned. And, as we have previously pointed out, the correctness of the 1975 survey is, itself, not properly an issue in the present case.

The dissent also focusses on the fact that appellant believed the land now identified as Tract 40 was part of lot 9. We do not question that appellant did so believe. But such a belief merely establishes her good faith. She is still required to show a document which on its face purports to convey the land now identified as Tract 40. No such document exists. Every single document in the long chain of title relates solely to "lot 9." Nor does there exist any extrinsic evidence such as maps or the like that would indicate that lot 9 included the other nearby island now identified as Tract 40. The dissent's attempt to leap this evidentiary chasm by arguing that, since appellant believed lot 9 included Tract 40, a conveyance of lot 9 should give color of title to Tract 40 is not only circular, it would totally read out of the statute the requirement that an applicant have a color or claim of title to the land sought. The dissent's approach would essentially render the statute into an unintentional trespass act. And, on this point it is, perhaps, instructive to recall that Congress did adopt an Unintentional Trespass Act (UTA) in 1968.

The Act of September 26, 1968, 82 Stat. 870, 43 U.S.C. §§ 1431-1435 (1970), was adopted to provide the Secretary of the Interior with authority to sell up to 120 acres of land which had been cultivated in unintentional trespass to contiguous landowners. In discussing the need for this Act, Congress noted that in a number of cases, the uncertain nature of boundary lines had resulted in the assumption of landowners that they owned land which was, in fact, not within the limits of their property, but which they had long ago reduced to cultivation in the mistaken belief that it was. Congress noted that "for any one of a number of reasons, these tracts can neither be disposed of under existing law to the individuals who have been using them for long periods of time nor put up for sale to the general public." H. Rep. No. 1791, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News at 3610. Accordingly, it adopted the UTA in order to provide the Secretary with a mechanism for conveying the land to those individuals who were using it in unintentional trespass.

If the dissent's theory of the Color of Title Act was correct, however, there would have been no need for Congress to adopt the UTA. The individuals who had, in good faith, cultivated Federal land beyond the limits of their ownership would have qualified for relief under the Color of Title Act merely by the good faith erroneous belief that they owned the land. The adoption of the UTA in 1968 clearly shows that Congress recognized that mere good faith use of public land was insufficient to justify grant of a color-of-title application, the dissent's analysis to the contrary notwithstanding. An individual qualifies for relief under the Color of Title Act only where good faith use is coupled with an instrument which, on its face, purports to convey title to the land.

Finally, we note that the dissent asserts that "[c]omparison of the 1931 plat and the plat approved in 1981 would clearly support a finding that Tract 40 is now positioned within the outline of lot 9 on the 1931 plat." We have already rejected the assertion that anything on the 1931 plat of survey was intended to describe the acreage or configuration of lot 9. But, even if the 1931 plat had been so designed, we fail to see how a review of the plat provides any support to the assertion that Tract 40 "is positioned within the outline of lot 9 on the 1931 plat."

The 1931 plat is drawn on a scale of 20 chains to an inch. The southern tip of lot 9 is depicted as approximately three-eighths of an inch north of the common section line between secs. 21 and 28, or approximately 7.5 chains. Since a surveyor's chain is 66 feet long, the southern tip of lot 9 is approximately 495 feet north of the common section line. The 1981 plat of survey was also drawn on a scale of 20 chains to an inch. It depicts lot 9 as only one-fourth of an inch (or 5 chains) north of the common section line. It also shows the southern tip of Tract 40 as only one-sixteenth of an inch (or 1.25 chains) from the common section line. In other words, Tract 40 is shown on the 1981 plat of survey as terminating approximately 85 feet north of the common section line, whereas the 1931 plat depicts lot 9 as extending no further south than 495 feet from that line. This represents a hiatus of 410 linear feet, and means that lot 9, as depicted on the 1931 plat, is 410 feet too far north to be said to embrace Tract 40. Our review of the plat thus discloses no substantiation for the dissent's factual assertions, even if the underlying theory propounded by the dissent were correct.

We have no cause to doubt the honesty of appellant's belief that Tract 40 was part of lot 9. But, mere good faith, without more, does not give rise to a claim or color of title. There is, however, simply no instrument which, on its face, purports to convey the land identified as Tract 40, nor are there any allegations as to the existence of extrinsic evidence which might justify an interpretation of a conveyance of lot 9 as including such lands.

While not unsympathetic to appellant's plight, we do not think that we can allow this to override the requirements of the law. In this regard, we note that the State Office is also considering the possibility of a sale of the land to appellant. Such action is, in our view, eminently justified on

the basis of the present record. But, insofar as the question of compliance with the requirements of the Color of Title Act is concerned, the decision rejecting the application must be sustained.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

With one important exception, I have no argument with the majority opinion in this case. However, I find this difference of opinion to have a direct bearing on the outcome, especially in light of the stated purpose and intent of Congress when amending the Color of Title Act in 1953.

The Color of Title Act, 43 U.S.C. §§ 1068-1068b (1982), was amended on July 28, 1953, to grant authority to the Secretary of the Interior to "issue patents to those holding under color of title. Enactment * * * would permit claimants to secure relief through administrative action [and] make unnecessary the handling by Congress of so many private bills." S. Rep. No. 588, 83rd Cong., 1st Sess. 1, reprinted in 1953 U.S. Code Cong. & Admin. News 2014. If we are to accept the Senate report as correct, the "bill would require the Secretary * * * to issue patents to all those who have held lands in good faith and adverse possession under color of title for more than 20 years and who have * * * made valuable improvements on it." Id.

Historically, the most common facts supporting approval of a color-of-title application arose because a person made a homestead entry and sold the entry tract prior to perfecting the homestead. The local taxing entity would then place the lands on the tax roll, based on the recorded deed, without confirming the issuance of patent. This was typically followed by a long history of conveyances, improvement, and payment of taxes for a tract of land that had never been patented. In such cases, many years after the initial occupancy, the Bureau of Land Management (BLM) would discover that the land listed in its records as public lands was being occupied and used. Prior to enactment of the Color Title Act it was common practice for the party occupying the land under color of title to seek issuance of a land patent through a private bill passed by Congress. The intent and purpose of the Color of Title Act was to permit the Secretary of the Interior the means to grant relief to those who settled on the lands in good faith, under color of title, and invested their labor and money to improve the land.

Although the facts in this case do not fit precisely into the historic "mold," they are sufficiently similar to allow relief to appellant. The facts relevant to this dissent are as follows. Sec. 21, which contains the island in question, was first surveyed in 1895-93 and lotted on a plat approved in 1895. 1/ A number of subsequent surveys were conducted in and around sec. 21, and plats reflecting those surveys were approved in 1920, 1927, 1931, and 1960. The island was never identified on any of these plats. During the course of what appears to be the fifth Government survey of sec. 21, conducted in 1975, and approved in 1981, the island was surveyed and designated as Tract 40. This tract lies a very short distance southwest of a much larger island identified in the 1892-93 survey as lot 9. It is not known whether this smaller island was connected to the larger island by

1/ A discussion of the survey practice in use at the time is found in the majority opinion.

a narrow neck at the time of the earlier surveys or existed as an independent island separated by a shallow body of water. 2/

Appellant's predecessors-in-interest acquired title to lot 9 through patent issued in 1901. It is clear from the record and the actions of the parties in possession of the land from 1941 (if not earlier) that the smaller island now designated as Tract 40 was thought to be a part of lot 9. There is no evidence indicating that prior to 1981 anyone knew, or even suspected, that lot 9 did not include what is now known as Tract 40. 3/ Improvements were erected on what is now Tract 40. The land was described as a part of lot 9 on the county tax rolls, assessed for tax purposes, and real property taxes were levied based upon those assessments.

In 1957 what the parties believed to be "Lot 9" was "subdivided" and a portion of that lot was sold. The deed specifically retained that portion of lot 9 described as lying west of a line projected north-south 1,125 feet from the westerly boundary of sec. 21. By decree of distribution issued in 1959, that portion of lot 9 lying west of the same north-south line was conveyed to appellant's predecessor. The parties drew this description to separate the ownership of the small island from the large one. The ownership of Tract 40 was never questioned until after a resurvey undertaken by BLM in 1975.

Until 1981 Government records contained no precise description of the tract now designated to be "Tract 40." In fact, the various plats filed as a result of Government surveys all depict lot 9 in a slightly different manner. The plat which has the most bearing on the interpretation of the conveyances, and thus on validity of appellant's color of title claim, is the plat approved in 1931. This was the latest plat depicting sec. 21 at the time of the conveyances. 4/ The 1931 plat clearly depicts the westerly tip of lot 9 as being noticeably longer than it is shown on either the 1895 or the 1981 plat. The course of this elongation is in line with the 1975 placement of Tract 40. Comparison of the 1931 plat and the plat approved in 1981 would clearly support a finding that Tract 40 is now positioned within the outline of lot 9 on the 1931 plat. 5/

2/ Appellant states that for a number of years she waded from lot 9 to what is now known as Tract 40.
3/ This conclusion comports with the conclusion reached by BLM during the course of its investigation. See Land Report dated Sept. 30, 1982, at IIe.
4/ The majority notes that while the 1931 survey plat is an "official" survey plat, it was not an "official" survey plat of lot 9. However, it remains that the 1895 plat indicates open water between lot 9 and the other lotted islands. The plat approved in 1931 identifies a previously unidentified island less than one-quarter mile to the west of lot 9 as lot 10. This island is 0.33 acres in size, and is smaller than the island now identified as Tract 40.
5/ By comparing the location of lot 9 on the plats, the majority chooses to ignore the obvious change in configuration.

The majority concedes that the requirements for the grant of patent under the Color of Title Act have all been met, save (according to the majority) the requirement that the claim or color of title "must be established by a deed or other writing which purports to pass title and appears to be title to the land, but which is not good title." Marcus Rudnick, 8 IBLA 65 (1972), is cited in support of this position. 6/

The paramount consideration when interpreting a legal description in a deed or similar instrument is the intent of the parties. See 23 Am. Jur. 2d Deeds §§ 50 and 221 (1983). Thus, if the conveyance documents adequately identify what the parties intended to convey, they establish color of title. If, on the other hand, they are so vague that the intent of the parties cannot be ascertained, no color of title is established.

The majority finds no evidence in the record that the documents conveyed Tract 40 with sufficient exactitude to support a color-of-title claim. They hold that "appellant has not even alleged facts which would justify resorting to such evidence." Yet there is no evidence indicating that the conveyance documents described something other than what the parties now claim to have been conveyed. The intent of the parties in this case is demonstrated by their actions long before there was any hint that they did not own the land.

The keystone premise of the opinion offered by the majority is that the legal description contained in a series of conveyances must now be interpreted to have conveyed nothing. I must concede that they are correct. However, I also have no doubt that the documents also reflect what the parties intended to convey or that those conveyances created a color of title. At the time of the conveyances in question, what is now deemed to be Tract 40 was reasonably, but mistakenly, considered to be a part of lot 9.

There can be no argument that, in the initial conveyance, the parties intended to subdivide lot 9 by conveying the land now known as lot 9 and retaining the island now known as Tract 40. There is also no doubt that, in the subsequent decree of distribution, the intent was to lodge ownership in what is now known as Tract 40 in the heirs of the initial grantor. 7/ The question is whether the conveyance document is sufficiently accurate to form the basis of a color-of-title action for what is now Tract 40. The

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6/ Although it is not totally clear, I assume the majority does not hold that a decree of distribution does not qualify as a basis for a color-of-title claim. Rather they find the description found in the decree of distribution to be insufficient to create a color of title to what is now designated to be Tract 40.

7/ This is not a dispute between two adjacent private landowners regarding a portion of what is now known as lot 9, or even a dispute regarding the present description of lot 9. There is nothing in the record to give rise to a question regarding what was intended when drafting the instruments.

majority states that "there is, however, simply no instrument which, on its face purports to convey the land identified as Tract 40, nor are there any allegations as to the existence of extrinsic evidence which might justify an interpretation of a conveyance of lot 9 as including such lands." I am at a loss. I find nothing in the record to allow me to hold that the legal descriptions in the documents were intended to describe anything other than what appellant now seeks.

The majority states that the decisions cited in Marble M. Farlow, 30 IBLA 32, 84 I.D. 276 (1977), and the other cases cited in the majority opinion

> stand in stark contrast to the facts in this appeal. While appellant asserts that she has always considered the lands now described as Tract 40 to be a part of lot 9, there is no allegation whatsoever of extrinsic evidence such as local plats, maps, etc., that show such land as a part of lot 9.

In reaching this conclusion the majority appears to disregard BLM's findings, overlook the fact that the property was carried on the tax rolls for a number of years as a part of lot 9, and ignore the documents of conveyance depicting the island as a part of lot 9. In fact, the initial report prepared by the BLM field examiner states that "review of * * * the St. Louis County official records shows that the applicant's Color-of-Title is based on describing the island as part of Government Lot 9 which is a surveyed island" (Sept. 30, 1982, BLM Land Report at 3).

In order to say that the language contained in the conveyance documents did not convey what is now known as Tract 40, crucial language in those documents must be rendered meaningless. Whenever possible, a conveyance should be construed as to make all of its provisions operative and effective. See 23 Am. Jur. 2d Deeds § 227 (1983). When a person executes a conveyance document it is presumed that he intended to convey something. See 23 Am. Jur. 2d Deeds § 301 (1983). The majority finds the conveyance documents do not describe a conveyance of Tract 40. Yet, there can be no other conclusion. If the decree of distribution did not convey Tract 40, it conveyed nothing. The color of title arose from the mistaken belief that lot 9 included what was subsequently identified as Tract 40.

The majority freely admits that appellant believed she owned the island in good faith. If the majority admits good faith possession, they must also recognize that appellant's good faith stemmed from the belief that the conveyance documents conveyed that island now being sought. There is nothing in the record to indicate otherwise. The good faith belief of the claimants and the documents are so intertwined as to render the attempt to separate them arbitrary. In 1957, when lot 9 was conveyed, the parties intended to retain what is now Tract 40. The conveyance was drafted with the good faith belief that it adequately described what is now Tract 40. The parties to the conveyance understood the meaning of the descriptions. Likewise, when the decree of distribution was drafted in 1959, the parties drafted

that document with the good faith belief that the document described what they intended to convey.

If we are to concede an "ambiguity" exists when these documents are viewed in light of the 1975 survey, we must also admit the clear intent of the parties in 1957 and 1959 was to retain (and subsequently convey) the island in question. The "ambiguity" is created by trying to interpret the deed with 1988 knowledge, but does not exist when the record is examined in light of the understanding of the parties at the time the documents were drafted. The primary rule of construction is that the real intention of the parties, particularly the grantor, is to be sought whenever possible. See 23 Am. Jur. 2d Deeds § 221 (1983). That intent is established by examining the surrounding circumstances at the time of execution. See 23 Am. Jur. 2d Deeds §§ 221, 310, 321 (1983).

Everything in the record supports a finding that the documents were the basis for appellant's belief that what is now designated as Tract 40 was a part of lot 9. In every case cited by the majority there was conflicting evidence as to the interpretation of the conveyance documents submitted in support of the claim. In this case, there is nothing in the record to raise a doubt regarding the appellant's claim that the documents represent an intent to convey the island in question. The explanation of the survey practice in the majority opinion clearly illustrates why it was impossible to precisely describe Tract 40 until 1975.

The majority concludes that the descriptions in the conveyance documents are not sufficiently precise to form the basis of a color-of-title claim, but is silent as to why the documents do not purport to convey that land being sought. In fact, there appears to be no question in the majority's mind that they do not. The majority cannot even find sufficient issue of fact regarding the descriptions in the conveyances to order a hearing, which would allow the appellant an opportunity to present testimony and additional evidence. Cf. Heirs of Linda Anelon, 101 IBLA 333 (1988); First American Title Insurance Co., 100 IBLA 270 (1987). At the very least, the sufficiency of the description is in issue.

Throughout its opinion the majority has cast the color-of-title claim as a challenge to the survey. If this were true, I would join the majority and hold that a color of title action is an improper means to challenge a survey. In order to file a color-of-title claim, the party must recognize that the title to the property is lodged in the United States. Jerome L. Kolstad, 93 IBLA 119, 122 (1986). I find nothing in the record to indicate that appellant claims the Government does not own Tract 40. The majority's discussion of the color-of-title claim as a challenge to the ownership of Tract 40 obscures the fact that appellant has admitted she does not own the island. What she is saying is that she thought she did, and that the conveyance documents are the basis for that belief. 8/

8/ In the discussion of the purpose of the Color of Title Act, I noted that a color of title often arose when a homesteader sold his land but had not

Contrary to the holding in the majority opinion, I have no difficulty finding that the circumstances at the time of execution of the documents giving color of title, form sound justification for a conclusion that Tract 40 had been held in good faith and in peaceful adverse possession by appellant and her ancestors or grantors under claim or color of title for more than 20 years and that valuable improvements have been placed on Tract 40. Appellant has met the requirements of 43 U.S.C. § 1068 (1982). The case should be remanded to BLM with instructions that they continue with the processing of her color-of-title application.

Although I am normally reluctant to give advice to an appellant who has lost on appeal, I note that, in addition to the obvious route of resorting to the courts, a possible basis for relief would lie in the underlying reason for the passage of the Color of Title Act. The interpretation of the Act set out in the majority opinion has denied appellant the relief I believe Congress intended afforded by the Act. However, the avenue of relief through a private bill is still available.

R. W. Mullen
Administrative Judge

fn. 8 (continued)
perfected an entry. The land was placed on the tax roll and the purchaser relied on the conveyance. Appellant relied on the conveyances in question. Otherwise the exception to the initial deed and the decree of distribution are meaningless. If meaning is given to the conveyance language a color of title is created. We must not confuse this case with an unintentional trespass case. The issues are not the same.